

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MIKE BECKER

Claimant

VS.

ELDORADO NATIONAL COMPANY INC.

Respondent

Self-Insured

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Docket No. 1,033,681

ORDER

Respondent appeals the May 14, 2007 preliminary hearing Order of Administrative Law Judge Bruce E. Moore. The Administrative Law Judge (ALJ) determined that claimant suffered accidental injury arising out of and in the course of his employment, timely notice had been provided and timely written claim had been filed pursuant to K.S.A. 44-527. Claimant was awarded medical treatment, with respondent being ordered to provide claimant/claimant's counsel the names of three qualified physicians from which claimant would designate the authorized treating physician. Claimant appeared by his attorney, John M. Ostrowski of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Mickey W. Mosier of Salina, Kansas.

The Appeals Board (Board) has adopted the same stipulations as did the ALJ, and has considered the same record as did the ALJ, consisting of the preliminary hearing transcript of May 11, 2007, with the attached exhibits; the evidentiary deposition of Mike Becker (claimant) taken on April 26, 2007, with the attached exhibits; the evidentiary deposition of Frederick R. Sheldon, taken on April 26, 2007, with the attached exhibits; the evidentiary deposition of Christy Brown, taken on April 26, 2007, with the attached exhibits; and the evidentiary deposition of Tony Millholland, taken on April 26, 2007, with the attached exhibits; and the documents filed of record with the Division of Workers Compensation.

ISSUES

1. Did claimant suffer accidental injury on August 7, 2006?

2. If claimant did suffer accidental injury on August 7, 2006, did claimant's accidental injury arise out of and in the course of his employment with respondent?
3. Did claimant provide timely notice of accident to respondent?
4. Did claimant serve respondent with timely written claim of accident?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent on April 26, 2004, as a welder. Claimant began developing back problems, the cause of which is not contained in this record, and elected to take FMLA leave beginning July 26, 2006. Claimant returned to work for respondent on August 7, 2006. After working for about two hours, claimant suffered an injury to his low back when he helped a co-worker pick up a spring which weighed between 75 and 100 pounds. The co-worker, Harold Taylor, verified the accident did occur as claimant described. Their testimonies regarding the accident are uncontradicted in this record. Mr. Taylor then contacted the claimant's lead man, Tony Millholland, and reported that claimant had injured himself. Mr. Millholland talked to claimant about the accident and requested that claimant fill out an accident report. Claimant took the form to respondent's human resources employee, Christy Brown, but did not fill the form out. Claimant testified that he was in pain and only wanted to go to his chiropractor. No accident report was completed by respondent. Claimant's testimony regarding these events is uncontradicted. Mr. Millholland acknowledges that claimant told him of the accident and claimant was told to fill out the accident report. Ms. Brown recalls claimant coming to her office with the uncompleted form and requesting medical treatment. Claimant filed his E-1 Application For Hearing with the Division of Workers Compensation on March 19, 2007.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

¹ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁵

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.⁶

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 2006 Supp. 44-501(a).

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁵ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁶ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

K.S.A. 2006 Supp. 44-508(d) defines “accident” as,

. . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.⁷

Injury or personal injury has been defined to mean,

. . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.⁸

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.⁹

No proceedings for compensation shall be maintainable under the workmen’s compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .¹⁰

K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge:

(a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee’s employment and of which the employer or the employer’s supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents,

⁷ K.S.A. 2006 Supp. 44-508(d).

⁸ K.S.A. 2006 Supp. 44-508(e).

⁹ K.S.A. 44-520.

¹⁰ K.S.A. 44-520a(a).

are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.¹¹

Subsection (c) of K.S.A. 44-557 provides:

(c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.¹²

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

ANALYSIS

Claimant's description of the accident is not only uncontradicted in this record, it is supported by the testimony of respondent's employees Harold Taylor, Tony Millholland and Christy Brown. Clearly, claimant suffered an exacerbation of his preexisting back problems when he helped Mr. Taylor lift the spring. The law in Kansas does not require an injury be "caused" by an accident. It allows that an injury may be compensable even if the accident only exacerbates a preexisting condition.

The notice given to Tony Millholland, claimant's lead man, satisfies the requirements of K.S.A. 44-520. Mr. Millholland's description of the conversation after claimant's injury verifies that claimant was injured, described the injury, and was directed toward medical treatment for that injury.

¹¹ K.S.A. 44-557(a).

¹² K.S.A. 44-557(c).

¹³ K.S.A. 44-534a.

Finally, respondent has the duty to file an accident report with the Director when notified of a work-related accident. If respondent fails to file that report within 28 days of that notification, then the time for filing written claim is extended to one year from the date of accident. Claimant's E-1 was filed March 19, 2007, which is within one year of the August 7, 2006 accident.

CONCLUSIONS

Claimant has proven that he suffered an accidental injury which arose out of and in the course of his employment with respondent, that he gave respondent timely notice of that accident, and that he submitted timely written claim for that accident. The Order of the ALJ should, therefore, be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 14, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2007.

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge